

Introduced by Senator Huff

February 16, 2011

An act to amend Section 651 of the Business and Professions Code, relating to healing arts.

LEGISLATIVE COUNSEL'S DIGEST

SB 399, as introduced, Huff. Healing arts: advertising.

Existing law provides for the licensure and regulation of the practice of various healing arts practitioners by boards under the Department of Consumer Affairs. Existing law makes it unlawful for those practitioners to disseminate a false, fraudulent, misleading, or deceptive statement and defines those terms for its purposes.

This bill would make technical, nonsubstantive changes to those provisions.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 651 of the Business and Professions Code
2 is amended to read:
3 651. (a) It is unlawful for any person licensed under this
4 division or under any initiative act referred to in this division to
5 disseminate or cause to be disseminated any form of public
6 communication containing a false, fraudulent, misleading, or
7 deceptive statement, claim, or image for the purpose of or likely
8 to induce, directly or indirectly, the rendering of professional
9 services or furnishing of products in connection with the
10 professional practice or business for which he or she is licensed.

1 A “public communication” as used in this section includes, but is
2 not limited to, communication by means of mail, television, radio,
3 motion picture, newspaper, book, list or directory of healing arts
4 practitioners, Internet, or other electronic communication.

5 (b) A false, fraudulent, misleading, or deceptive statement,
6 claim, or image includes a statement or claim that does any of the
7 following:

8 (1) Contains a misrepresentation of fact.

9 (2) Is likely to mislead or deceive because of a failure to disclose
10 material facts.

11 (3) (A) Is intended, or is likely, to create false or unjustified
12 expectations of favorable results, including the use of any
13 photograph or other image that does not accurately depict the
14 results of the procedure being advertised or that has been altered
15 in any manner from the image of the actual subject depicted in the
16 photograph or image.

17 (B) Use of any photograph or other image of a model without
18 clearly stating in a prominent location in easily readable type the
19 fact that the photograph or image is of a model is a violation of
20 subdivision (a). For purposes of this paragraph, a model is anyone
21 other than an actual patient, who has undergone the procedure
22 being advertised, of the licensee who is advertising for his or her
23 services.

24 (C) Use of any photograph or other image of an actual patient
25 that depicts or purports to depict the results of any procedure, or
26 presents “before” and “after” views of a patient, without specifying
27 in a prominent location in easily readable type size what procedures
28 were performed on that patient is a violation of subdivision (a).
29 Any “before” and “after” views (i) shall be comparable in
30 presentation so that the results are not distorted by favorable poses,
31 lighting, or other features of presentation, and (ii) shall contain a
32 statement that the same “before” and “after” results may not occur
33 for all patients.

34 (4) Relates to fees, other than a standard consultation fee or a
35 range of fees for specific types of services, without fully and
36 specifically disclosing all variables and other material factors.

37 (5) Contains other representations or implications that in
38 reasonable probability will cause an ordinarily prudent person to
39 misunderstand or be deceived.

1 (6) Makes a claim either of professional superiority or of
2 performing services in a superior manner, unless that claim is
3 relevant to the service being performed and can be substantiated
4 with objective scientific evidence.

5 (7) Makes a scientific claim that cannot be substantiated by
6 reliable, peer reviewed, published scientific studies.

7 (8) Includes any statement, endorsement, or testimonial that is
8 likely to mislead or deceive because of a failure to disclose material
9 facts.

10 (c) Any price advertisement shall be exact, without the use of
11 phrases, including, but not limited to, “as low as,” “and up,”
12 “lowest prices,” or words or phrases of similar import. Any
13 advertisement that refers to services, or costs for services, and that
14 uses words of comparison shall be based on verifiable data
15 substantiating the comparison. Any person so advertising shall be
16 prepared to provide information sufficient to establish the accuracy
17 of that comparison. Price advertising shall not be fraudulent,
18 deceitful, or misleading, including statements or advertisements
19 of bait, discount, premiums, gifts, or any statements of a similar
20 nature. In connection with price advertising, the price for each
21 product or service shall be clearly identifiable. The price advertised
22 for products shall include charges for any related professional
23 services, including dispensing and fitting services, unless the
24 advertisement specifically and clearly indicates otherwise.

25 (d) Any person so licensed shall not compensate or give anything
26 of value to a representative of the press, radio, television, or other
27 communication medium in anticipation of, or in return for,
28 professional publicity unless the fact of compensation is made
29 known in that publicity.

30 (e) Any person so licensed may not use any professional card,
31 professional announcement card, office sign, letterhead, telephone
32 directory listing, medical list, medical directory listing, or a similar
33 professional notice or device if it includes a statement or claim
34 that is false, fraudulent, misleading, or deceptive within the
35 meaning of subdivision (b).

36 (f) Any person so licensed who violates this section is guilty of
37 a misdemeanor. A bona fide mistake of fact shall be a defense to
38 this subdivision, but only to this subdivision.

1 (g) Any violation of this section by a person so licensed shall
2 constitute good cause for revocation or suspension of his or her
3 license or other disciplinary action.

4 (h) Advertising by any person so licensed may include the
5 following:

6 (1) A statement of the name of the practitioner.

7 (2) A statement of addresses and telephone numbers of the
8 offices maintained by the practitioner.

9 (3) A statement of office hours regularly maintained by the
10 practitioner.

11 (4) A statement of languages, other than English, fluently spoken
12 by the practitioner or a person in the practitioner's office.

13 (5) (A) A statement that the practitioner is certified by a private
14 or public board or agency or a statement that the practitioner limits
15 his or her practice to specific fields.

16 (i) For the purposes of this section, a dentist licensed under
17 Chapter 4 (commencing with Section 1600) may not hold himself
18 or herself out as a specialist, or advertise membership in or
19 specialty recognition by an accrediting organization, unless the
20 practitioner has completed a specialty education program approved
21 by the American Dental Association and the Commission on Dental
22 Accreditation, is eligible for examination by a national specialty
23 board recognized by the American Dental Association, or is a
24 diplomate of a national specialty board recognized by the American
25 Dental Association.

26 (ii) A dentist licensed under Chapter 4 (commencing with
27 Section 1600) shall not represent to the public or advertise
28 accreditation either in a specialty area of practice or by a board
29 not meeting the requirements of clause (i) unless the dentist has
30 attained membership in or otherwise been credentialed by an
31 accrediting organization that is recognized by the board as a bona
32 fide organization for that area of dental practice. In order to be
33 recognized by the board as a bona fide accrediting organization
34 for a specific area of dental practice other than a specialty area of
35 dentistry authorized under clause (i), the organization shall
36 condition membership or credentialing of its members upon all of
37 the following:

38 (I) Successful completion of a formal, full-time advanced
39 education program that is affiliated with or sponsored by a

1 university based dental school and is beyond the dental degree at
2 a graduate or postgraduate level.

3 (II) Prior didactic training and clinical experience in the specific
4 area of dentistry that is greater than that of other dentists.

5 (III) Successful completion of oral and written examinations
6 based on psychometric principles.

7 (iii) Notwithstanding the requirements of clauses (i) and (ii), a
8 dentist who lacks membership in or certification, diplomate status,
9 other similar credentials, or completed advanced training approved
10 as bona fide either by an American Dental Association recognized
11 accrediting organization or by the board, may announce a practice
12 emphasis in any other area of dental practice only if the dentist
13 incorporates in capital letters or some other manner clearly
14 distinguishable from the rest of the announcement, solicitation, or
15 advertisement that he or she is a general dentist.

16 (iv) A statement of certification by a practitioner licensed under
17 Chapter 7 (commencing with Section 3000) shall only include a
18 statement that he or she is certified or eligible for certification by
19 a private or public board or parent association recognized by that
20 practitioner's licensing board.

21 (B) A physician and surgeon licensed under Chapter 5
22 (commencing with Section 2000) by the Medical Board of
23 California may include a statement that he or she limits his or her
24 practice to specific fields, but shall not include a statement that he
25 or she is certified or eligible for certification by a private or public
26 board or parent association, including, but not limited to, a
27 multidisciplinary board or association, unless that board or
28 association is (i) an American Board of Medical Specialties
29 member board, (ii) a board or association with equivalent
30 requirements approved by that physician and surgeon's licensing
31 board, or (iii) a board or association with an Accreditation Council
32 for Graduate Medical Education approved postgraduate training
33 program that provides complete training in that specialty or
34 subspecialty. A physician and surgeon licensed under Chapter 5
35 (commencing with Section 2000) by the Medical Board of
36 California who is certified by an organization other than a board
37 or association referred to in clause (i), (ii), or (iii) shall not use the
38 term "board certified" in reference to that certification, unless the
39 physician and surgeon is also licensed under Chapter 4
40 (commencing with Section 1600) and the use of the term "board

certified” in reference to that certification is in accordance with subparagraph (A). A physician and surgeon licensed under Chapter 5 (commencing with Section 2000) by the Medical Board of California who is certified by a board or association referred to in clause (i), (ii), or (iii) shall not use the term “board certified” unless the full name of the certifying board is also used and given comparable prominence with the term “board certified” in the statement.

For purposes of this subparagraph, a “multidisciplinary board or association” means an educational certifying body that has a psychometrically valid testing process, as determined by the Medical Board of California, for certifying medical doctors and other health care professionals that is based on the applicant’s education, training, and experience.

For purposes of the term “board certified,” as used in this subparagraph, the terms “board” and “association” mean an organization that is an American Board of Medical Specialties member board, an organization with equivalent requirements approved by a physician and surgeon’s licensing board, or an organization with an Accreditation Council for Graduate Medical Education approved postgraduate training program that provides complete training in a specialty or subspecialty.

The Medical Board of California shall adopt regulations to establish and collect a reasonable fee from each board or association applying for recognition pursuant to this subparagraph. The fee shall not exceed the cost of administering this subparagraph. Notwithstanding Section 2 of Chapter 1660 of the Statutes of 1990, this subparagraph shall become operative July 1, 1993. However, an administrative agency or accrediting organization may take any action contemplated by this subparagraph relating to the establishment or approval of specialist requirements on and after January 1, 1991.

(C) A doctor of podiatric medicine licensed under Chapter 5 (commencing with Section 2000) by the Medical Board of California may include a statement that he or she is certified or eligible or qualified for certification by a private or public board or parent association, including, but not limited to, a multidisciplinary board or association, if that board or association meets one of the following requirements: (i) is approved by the Council on Podiatric Medical Education, (ii) is a board or

1 association with equivalent requirements approved by the
2 California Board of Podiatric Medicine, or (iii) is a board or
3 association with the Council on Podiatric Medical Education
4 approved postgraduate training programs that provide training in
5 podiatric medicine and podiatric surgery. A doctor of podiatric
6 medicine licensed under Chapter 5 (commencing with Section
7 2000) by the Medical Board of California who is certified by a
8 board or association referred to in clause (i), (ii), or (iii) shall not
9 use the term “board certified” unless the full name of the certifying
10 board is also used and given comparable prominence with the term
11 “board certified” in the statement. A doctor of podiatric medicine
12 licensed under Chapter 5 (commencing with Section 2000) by the
13 Medical Board of California who is certified by an organization
14 other than a board or association referred to in clause (i), (ii), or
15 (iii) shall not use the term “board certified” in reference to that
16 certification.

17 For purposes of this subparagraph, a “multidisciplinary board
18 or association” means an educational certifying body that has a
19 psychometrically valid testing process, as determined by the
20 California Board of Podiatric Medicine, for certifying doctors of
21 podiatric medicine that is based on the applicant’s education,
22 training, and experience. For purposes of the term “board certified,”
23 as used in this subparagraph, the terms “board” and “association”
24 mean an organization that is a Council on Podiatric Medical
25 Education approved board, an organization with equivalent
26 requirements approved by the California Board of Podiatric
27 Medicine, or an organization with a Council on Podiatric Medical
28 Education approved postgraduate training program that provides
29 training in podiatric medicine and podiatric surgery.

30 The California Board of Podiatric Medicine shall adopt
31 regulations to establish and collect a reasonable fee from each
32 board or association applying for recognition pursuant to this
33 subparagraph, to be deposited in the State Treasury in the Podiatry
34 Fund, pursuant to Section 2499. The fee shall not exceed the cost
35 of administering this subparagraph.

36 (6) A statement that the practitioner provides services under a
37 specified private or public insurance plan or health care plan.

38 (7) A statement of names of schools and postgraduate clinical
39 training programs from which the practitioner has graduated,
40 together with the degrees received.

1 (8) A statement of publications authored by the practitioner.

2 (9) A statement of teaching positions currently or formerly held
3 by the practitioner, together with pertinent dates.

4 (10) A statement of his or her affiliations with hospitals or
5 clinics.

6 (11) A statement of the charges or fees for services or
7 commodities offered by the practitioner.

8 (12) A statement that the practitioner regularly accepts
9 installment payments of fees.

10 (13) Otherwise lawful images of a practitioner, his or her
11 physical facilities, or of a commodity to be advertised.

12 (14) A statement of the manufacturer, designer, style, make,
13 trade name, brand name, color, size, or type of commodities
14 advertised.

15 (15) An advertisement of a registered dispensing optician may
16 include statements in addition to those specified in paragraphs (1)
17 to (14), inclusive, provided that any statement shall not violate
18 subdivision (a), (b), (c), or (e) or any other section of this code.

19 (16) A statement, or statements, providing public health
20 information encouraging preventative or corrective care.

21 (17) Any other item of factual information that is not false,
22 fraudulent, misleading, or likely to deceive.

23 (i) Each of the healing arts boards and examining committees
24 within Division 2 shall adopt appropriate regulations to enforce
25 this section in accordance with Chapter 3.5 (commencing with
26 Section 11340) of Part 1 of Division 3 of Title 2 of the Government
27 Code.

28 Each of the healing arts boards and committees and examining
29 committees within Division 2 shall, by regulation, define those
30 efficacious services to be advertised by businesses or professions
31 under their jurisdiction for the purpose of determining whether
32 advertisements are false or misleading. Until a definition for that
33 service has been issued, no advertisement for that service shall be
34 disseminated. However, if a definition of a service has not been
35 issued by a board or committee within 120 days of receipt of a
36 request from a licensee, all those holding the license may advertise
37 the service. Those boards and committees shall adopt or modify
38 regulations defining what services may be advertised, the manner
39 in which defined services may be advertised, and restricting
40 advertising that would promote the inappropriate or excessive use

1 of health services or commodities. A board or committee shall not,
2 by regulation, unreasonably prevent truthful, nondeceptive price
3 or otherwise lawful forms of advertising of services or
4 commodities, by either outright prohibition or imposition of
5 onerous disclosure requirements. However, any member of a board
6 or committee acting in good faith in the adoption or enforcement
7 of any regulation shall be deemed to be acting as an agent of the
8 state.

9 (j) The Attorney General shall commence legal proceedings in
10 the appropriate forum to enjoin advertisements disseminated or
11 about to be disseminated in violation of this section and seek other
12 appropriate relief to enforce this section. Notwithstanding any
13 other provision of law, the costs of enforcing this section to the
14 respective licensing boards or committees may be awarded against
15 any licensee found to be in violation of any provision of this
16 section. This shall not diminish the power of district attorneys,
17 county counsels, or city attorneys pursuant to existing law to seek
18 appropriate relief.

19 (k) A physician and surgeon or doctor of podiatric medicine
20 licensed pursuant to Chapter 5 (commencing with Section 2000)
21 by the Medical Board of California who knowingly and
22 intentionally violates this section may be cited and assessed an
23 administrative fine not to exceed ten thousand dollars (\$10,000)
24 per event. Section 125.9 shall govern the issuance of this citation
25 and fine except that the fine limitations prescribed in paragraph
26 (3) of subdivision (b) of Section 125.9 shall not apply to a fine
27 under this subdivision.

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